

THIRTEENTH JUDICIAL DISTRICT  
STATE OF MONTANA

FILED

November 8 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

RUSSELL C. FAGG

DISTRICT JUDGE-DEPARTMENT 2

TERRY HALPIN, JUDICIAL ASSISTANT/TRANSCRIPTIONIST

DAVID RANDALL, LAW CLERK



PO BOX 35027  
BILLINGS, MONTANA 59107  
PHONE: 406.256.2906  
FAX: 406.256.2970

November 5, 2010

Chief Justice Mike McGrath  
Justice Brian Morris  
Justice James C. Nelson  
Justice W. William Leaphart  
Justice Patricia O'Brien Cotter  
Justice James A. Rice  
Justice Mike Wheat

Montana Supreme Court  
Room 323, Justice Building  
215 N. Sanders  
P.O. Box 203003  
Helena, Montana 59620-3003

Re: Support of LSR rule change

Montana Supreme Court Justices:

FILED

NOV 08 2010

*Ed Smith*  
CLERK OF THE SUPREME COURT  
STATE OF MONTANA

I am writing to urge your support of the rule changes proposed by the Supreme Court Equal Justice Task Force and Commission on Self-Represented Litigants, and the State Bar Access to Justice Committee. The group has proposed changes to Model Rules of Professional Conduct: 1.1, 1.2, 4.2, and 4.3 and additions to the Rules of Civil Procedure: 11(b), 4.2, and 4.3. The actual rules were worked on by a sub-committee of the Access to Justice Committee consisting of Patty Fain, Marjorie Thomas, Andrew King-Ries, Klaus Sitte, Michele Snowberger, Cynthia Smith, and Russ Fagg.

Please keep in mind LSR is ethical and available in Montana today under Rule 1.2(c). These proposed rules set out parameters and "best practices" in LSR. Furthermore, these rule changes will greatly improve access to justice by many Montanans and improve the Montana justice system. The first 3½ pages of this letter address the advantages of LSR. The last part of the letter addresses the reasoning behind the specific rule changes themselves.

## ADVANTAGES OF LSR

There is a profound need for legal assistance in Montana. In 2004, low to moderate-income Montanans were surveyed to assess their legal needs and the legal services to which they had access. Based on the responses gathered, it was reported that low to moderate-income Montanans had over 207,000 cases of legal need that went unmet every year.<sup>1</sup> Survey respondents had no legal representation in over 80% of the situations they reported.<sup>2</sup> The Montana Legal Services Association (MLSA), the sole legal services organization in the state, could meet only 9% of the need in addition to 10% provided by the private bar.<sup>3</sup> Whether or not a result of legal supply being outweighed by need, many litigants are now representing themselves.

*Pro se* litigants are on the rise, resulting in burdened courts and less effective representation. In 2000, the Conference of State Court Administrators concluded the “the recent surge in self-represented litigation is unprecedented and shows no signs of abating.”<sup>4</sup> This trend is not limited to state district courts. According to a 2008 report issued by the Montana Supreme Court, Clerk of Court, there were 184 *pro se* filings in 2008 before the Court.<sup>5</sup> This equated to 28.35% of the total filings for the year. Of the 184 filings, 90 were inmate *pro se* filings and 94 were non-inmate *pro se* filings. Having high numbers of *pro se* litigants imposes great costs on everyone involved. Courts are overburdened by *pro se* litigants who are not prepared. Judges struggle to balance their obligation to impartiality with the practical need to engage *pro se* litigants regarding their cases.<sup>6</sup>

LSR benefits lawyers in the same way it benefits those in need of legal services. LSR allows higher volumes of transactions in the legal services market. Lawyers could enjoy new business drawn in from a wider client pool. Those who were previously priced out of the market, due to the higher cost of full-service representation, may enter and negotiate for discrete,

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<sup>1</sup> D. Michael Dale, *Legal Needs of Low Income Households in Montana*, [http://www.lawhelp.org/documents/326071Full\\_Report\[1\].pdf?stateabbrev=MT/](http://www.lawhelp.org/documents/326071Full_Report[1].pdf?stateabbrev=MT/) (2005). The study was conducted by the Montana State Bar Association in conjunction with the Equal Justice Task Force and Access to Justice Committee.

<sup>2</sup> The ABA found similar rates of participation in the legal services market by low to moderate income families nationwide. See *ABA Handbook on Limited Scope Legal Assistance*, <http://www.abanet.org/litigation/taskforces/modest/report.pdf> (2003).

<sup>3</sup> *Statement of MLSA Board of Trustee*, <http://www.montanalawhelp.org/Program/575/showdocument.cfm?doctype=dynamicdoc&ichannelprofileid=42312&idynamicdocid=4472> (Mar. 2009).

<sup>4</sup> *ABA Handbook on Limited Scope Legal Assistance*, <http://www.abanet.org/litigation/taskforces/modest/report.pdf>, (2003) at 8 (citing *Conference of State Court Administrators, Position Paper on Self-Represented Litigation* (Gov’t Rel. Office ed. 2000)).

<sup>5</sup> Smith, Ed, *2008 Annual Caseload Statistics of the Montana Supreme Court*, Office of the Clerk of the Montana Supreme Court, (2008).

<sup>6</sup> Timothy Eaton & David Holtermann, *Expanding Access to Justice Limited Scope Representation is Here*, [http://www.abanet.org/legalservices/delivery/downloads/feature\\_eaton.pdf](http://www.abanet.org/legalservices/delivery/downloads/feature_eaton.pdf) (Apr. 2010).

or “unbundled,” services.<sup>7</sup> Thus, rather than being forced choose between going completely *pro se* or full-service, self-represented parties can, as consumers, choose the legal services they are able to afford and feel they need most. LSR encourages potential clients to seek legal assistance and discourages the inadequate alternatives. LSR allows legal professionals to provide a wide range of legal services to consumers who cannot afford full-service representation or who want to represent themselves.<sup>8</sup> Also, The ABA reports first-time limited-service clients frequently come back as full-service clients.<sup>9</sup> Through LSR, it will be easier for lawyers to compete against online information services, non-lawyer document preparation services, financial institutions, real estate companies, tax preparation services, accounting firms, and others who have become serious competitors for traditional full-service lawyers, and who often offer sub-standard service.<sup>10</sup> LSR will provide a vehicle for serving the legal need in Montana, while concurrently, increasing business opportunities for lawyers.

Furthermore, LSR would improve the quality of *pro se* representation in addition to easing the stress placed on the court system. LSR can greatly aid *pro se* litigants in addition to serving as a substantial method to remedy many ailments caused by self-represented individuals. Litigants would be more prepared and equipped, judges are better able to evaluate the case on the merits and attorneys are privy to otherwise untapped business.<sup>11</sup> Furthermore, in Massachusetts, where LSR has been used as a pilot, reports indicate pleadings improved, litigants were more realistic about their cases, the filing of frivolous motions was reduced, and the litigants understood the process better.<sup>12</sup> Also, court staff reported spending less “counter time” with self-represented parties and 75% of attorneys reported a high level of satisfaction with using LSR.<sup>13</sup> LSR has been so successful, the high court has allowed all lower courts to now use LSR, summing it up as a “win-win for the bar and for self-represented litigants.”<sup>14</sup> Adopting rules to encourage LSR would no doubt improve *pro se* representation in addition to helping the Montana court system.

Finally, encouraging LSR would improve public perception of the justice system. MLSA reported a marked difference in attitudes that survey respondents had towards the justice system, depending on whether they were able to procure legal assistance. Over 80% of those who were unsuccessful in retaining a lawyer had a negative view of the system. In stark contrast, only 37%

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<sup>7</sup> Althoff, Barrie, *Ethical Issues Posed by Limited-Scope Representation—The Washington Experience*, 2004 ABA Prof. Law. 67 (Jun. 2004).

<sup>8</sup> Herman, M. Madelynn, *Pro Se: Self-Represented Litigants Trends in 2003: Limited Scope Legal Assistance: An Emerging Option for Pro Se Litigants*, [www.ncsconline.org/WC/Publications/KIS\\_ProSe\\_Trends03.pdf](http://www.ncsconline.org/WC/Publications/KIS_ProSe_Trends03.pdf) (2003).

<sup>9</sup> ABA Handbook, *supra* note 2, at 11.

<sup>10</sup> *Id.*

<sup>11</sup> Ayn Crawley, Gerald Arnold & Alice Neece Mine, *Unbundled—A New Way to Practice?*, Mecklenburg County Bar Association CLE Manuscript (May 24, 2002).

<sup>12</sup> Eaton, *supra* note 8, at 39.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (quoting Judge Cynthia J. Cohen of the Massachusetts Appeals Court).

of the respondents who had legal representation viewed the system negatively.<sup>15</sup> A solid majority of represented respondents viewed the system at least somewhat positively.

The advantages of LSR are clear, but action is needed in order to allow LSR to grow. As of April, 2010, seventeen states have adopted procedural rules enabling lawyers to provide limited assistance in court.<sup>16</sup> These seventeen states have recognized the benefits of LSR and have taken steps to allow the much-needed regulation changes to foster LSR development. While LSR is available to Montana currently, the absence of a regulatory framework spelling out proper procedure for limited representation means it is unlikely that practitioners will venture into representing litigants on a limited basis.<sup>17</sup> Thus, it is crucial that the Montana Supreme Court adopt the proposed rule changes to encourage LSR, assist thousands of Montanans in legal need, and improve the legal system as a whole.

### SPECIFIC RULE CHANGES

Rule 1.1, Montana Rules of Professional Conduct, simply makes it clear competent representation is required in a LSR situation, but only that competence reasonably necessary for the limited representation. This rule may or may not be necessary. However, it is included, patterned after the Wyoming Rules of Professional Conduct, to make it clear that the extent of competence is proportional to the extent of the representation agreed to.

Rule 1.2 of the Montana Rules of Professional Conduct requires written consent when engaging in LSR. Requiring written consent is considered a “best practice” that provides a measure of protection for both the lawyer and the litigant. Of importance, the writing makes it clear to all parties what the LSR covers and what it does not cover. Furthermore, there are specific exceptions for legal services delivered through telephone hotlines and electronic communications, a request made by Montana Legal Services.

Rule 4.2 of the Montana Rules of Professional Conduct sets forth permissible communications between represented and self-represented parties in LSR situations. A person receiving limited representation is considered an unrepresented party by opposing counsel, unless the opposing counsel is given written notice of the LSR. This rule makes it clear what communication requirements are called for in LSR situations.

Last, Rule 4.3, Montana Rules of Professional Conduct is a companion rule to Rule 4.2. Under Rule 4.2, the otherwise unrepresented person is considered to be unrepresented for purposes of this Rule, unless the opposing lawyer has been provided written notice of the LSR arrangement.

Turning to the modifications to the Montana Rules of Civil Procedure, the new subsection (b) to Rule 11 expressly allows “ghost-writing.” This is perhaps the most controversial of the rule changes. The crux of the contentious issue is whether an attorney may rely upon the self-

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<sup>15</sup> Dale, *supra* note 1, at 19.

<sup>16</sup> Eaton, *supra* note 8, at 38.

<sup>17</sup> *Id.*

represented person's representation of facts without further enquiry, which is the rule in Colorado, Iowa, Missouri and Washington. Under Rule 11 currently, a lawyer is required to sign a pleading after reasonable inquiry. This requirement does not mesh with the limited nature of document preparation in LSR activities. However, keep in mind the attorney has to make independent reasonable inquiry if he has reason to believe that the representations presented to him by the self-represented person are false or materially insufficient. We firmly believe this is the right balance to achieve in Rule 11, and support the Rule 11 changes as suggested.


Rule 4.2 of the Montana Rules of Civil Procedure ensures that an attorney engaging in LSR is able to get out of that representation when his task is completed. The attorney will not be entering a formal appearance before the Court, and does not require the service or delivery of pleadings or documents upon that attorney. However, if the attorney appears before a Judge, that appearance constitutes an entry of appearance, except to the extent that a limited notice of appearance has been filed and served prior to the actual appearance. Again, this is a balancing act which is appropriate to promote LSR.

Rule 4.3 of the Montana Rules of Civil Procedure has two amendments. First, (a) outlines the procedure for entering a limited appearance, and (b) makes it clear that the attorney's role terminates without the necessity of leave of Court when the attorney files notice of completion of the limited appearance. These are important safeguards for the attorney, and lets the parties and the Court know what the appearance encompasses and what the appearance does not encompass.

### CONCLUSION

The proposed were passed unanimously by a joint meeting of the Montana Supreme Court Equal Justice Task Force, the Montana Supreme Court Commission on Self-Represented Litigants, and the Montana Bar Association Access to Justice Committee. The purpose of these rules is to encourage LSR in Montana. We believe that implementation of these rules will benefit Montana attorneys, Montana judges, and most importantly, Montana litigants. We urge your adoption.

Sincerely,



Judge Russell Fagg